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Supreme Court, U.S.
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No. 99-201

In the

Supreme Court of the United States

GABRIEL PEREZ,

Petitioner,

v.

WILLIAM D. O'SULLIVAN, Warden,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the statutory requirement that Petitioner obtain a certificate of appealability to proceed in the circuit court while the State does not need a certificate violates the constitutional due process right of access to the courts.

2. Whether Petitioner has established that a certificate of appealability should have been allowed in his case.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, dated October 6, 1998, of which Petitioner seeks this Court's review, is set forth in Appendix A to the instant Petition. The United States Court of Appeals for the Seventh Circuit declined to issue a certificate of appealability on April 30, 1999. That order is set forth in Appendix B to the instant Petition. Both decisions are unreported.

JURISDICTION

Petitioner's statement of jurisdiction is complete and correct.

CONSTITUTIONAL PROVISIONS

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Following a jury trial, Petitioner was convicted of murder. Petitioner appealed his conviction and sentence to the Illinois Appellate Court and that court affirmed Petitioner's conviction and sentence. Petitioner filed a petition for leave to appeal in the Illinois Supreme Court, which was denied. Petitioner subsequently filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois, raising the following three grounds for relief in his petition:

(1) Whether the use of Petitioner's statements violated his Fifth and Sixth Amendment rights;

(2) Whether Petitioner was denied due process by the introduction of "gang" evidence and by the prosecution's argument inviting jurors to rely on their general knowledge of gangs; and

(3) Whether the evidence was insufficient to establish Petitioner's guilt by [sic] a reasonable doubt.

The District Court denied the petition for writ of habeas corpus, holding that the Illinois Appellate Court's decision that Petitioner was not in custody when he spoke with officers was not unreasonable, and that Petitioner voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), therefore use of his statements did

not violate his Fifth and Sixth Amendment rights. The court further held that the Appellate Court's decision regarding "gang" evidence was not unreasonable. Finally, the District Court determined that the Illinois Appellate Court identified and applied the appropriate standard to Petitioner's claim that he was not proved guilty beyond a reasonable doubt.

Petitioner then filed a notice of appeal. The United States District Court for the Northern District of Illinois declined to issue a certificate of appealability because Petitioner did make a substantial showing of the denial of a constitutional right. Petitioner then asked the United States Court of Appeals for the Seventh Circuit to issue a certificate of appealability. The court reviewed the final order of the district court and the record on appeal and found no substantial showing of the denial of a constitutional right. The court accordingly denied the request for a certificate of appealability and denied the request to proceed without a certificate of appealability.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE REQUIREMENT THAT HE OBTAIN A CERTIFICATE OF APPEALABILITY.

Petitioner's argument that the provisions requiring Petitioner to obtain a certificate of appealability are unconstitutional must fail, as it is clear that this requirement is not a violation of due process and is not a denial of equal access to the courts. In *United States v. Pearce*, 146 F.3d 771 (10th Cir. 1998), the United States Court of

Appeals held that the government did not need to obtain a certificate of appealability. The court provided the following explanation for why a certificate was not required:

> In the instant case the government did not seek a certificate of appealability. In fact, as defendant points out, the government can never meet the criterion for a certificate of appealability- "[a] certificate of appealability may issue under paragraph 1 only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). The government is never an applicant in a §2255 proceeding, and can never show a denial of a constitutional right.

Pearce at 773. It is well established that the State is not required to obtain a certificate of appealability. *United States ex rel. Tillery v. Cavell*, 294 F.2d 12 (3rd Cir. 1961); *Texas v. Graves*, 352 F.2d 514 (5th Cir. 1965) (No necessity exists for state or its representative to obtain a certificate of probable cause to take an appeal to the court of appeals from a final order granting a writ of habeas corpus to a prisoner detained under process issued by a state court.); *United States ex rel. Calhoun v. Pate*, 341 F.2d 885 (7th Cir. 1965); *Buder v. Bell*, 306 F.2d 71 (6th Cir. 1962).

Furthermore, if the State is filing an appeal, it is because the United States District Court has granted a writ of habeas corpus. If a writ has been granted, that alone establishes a clear disagreement between courts, as the state court determined that there was no violation of the Petitioner's constitutional rights, while the United States District Court found that there was. With this obvious conflict established before the State would ever seek to appeal, the State would have met the require-

ments for obtaining a certificate of appealability. A petitioner seeking a certificate of probable cause must show not that he would prevail on the merits of his claim, but that issues are debatable among jurists of reason. *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Rector v. Johnson*, 120 F.3d 551 (5th Cir. 1997). If the State is appealing the granting of petition for writ of habeas corpus, it is automatically established that there is an issue of debate among jurists of reason.

Furthermore, Petitioner states that it is "inherently unfair . . . to treat individuals differently from the way States are treated. . ." It is unfair to treat similarly situated individuals differently, however, it is not the same in a situation where the parties are not in any way similar. In this situation, the State would not be receiving "selective treatment" as Petitioner claims. Instead, the State does not have to obtain a certificate because it could not possibly have the same violation of constitutional rights claims that an individual could have.

II.

PETITIONER HAS FAILED TO ESTABLISH THAT A CERTIFICATE OF APPEALABILITY SHOULD HAVE BEEN ALLOWED IN HIS CASE.

The District Court declined to issue a certificate of appealability because Petitioner did "not [make] a substantial showing of the denial of a constitutional right." (Appendix A). The Circuit Court of Appeals denied the request for a certificate of appealability and the request to proceed without a certificate of appealability, stating that "This court has reviewed the final order of the dis-

trict court and the record on appeal. We find no substantial showing of the denial of a constitutional right." The decision to grant a certificate of appealability is a discretionary one. As this Court has found, "It is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U.S.C. § 2253, should be exercised. (Citation omitted). As long as that court keeps within the bounds of judicial discretion, its action is not reviewable." *In Re Application of Burwell*, 350 U.S. 521 (1956). Because Petitioner has failed to establish how the courts erred in the decisions to not allow the certificate of appealability, Petitioner cannot now raise the substantive claims that would have been present for appeal if either of those courts had issued a certificate of appealability as to one or more of these issues. In the extraordinary situation that this Court were to find that Petitioner should have received a certificate of appealability, the remedy available to Petitioner should not be for this Court to consider the merits of Petitioner's fact specific claims. Instead, this Court should simply direct the United States Court of Appeals for the Seventh Circuit to consider Petitioner's appellate claims. It is an impractical use of this Court's time to review fairly generic claims like those Petitioner is raising, as they would require nothing more than error correcting, which is not this Court's traditional role. Therefore, this Court should not consider any of the underlying claims that Petitioner argues should have been present on appeal had a certificate of appealability been granted by either court.

This Court held in *Hohn v. United States*, 524 U.S. 236 (1998), that this Court does have jurisdiction to review

denials of applications for certificates of appealability. However, in that case, this Court limited its grant of certiorari to the following question: "In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General?" *Hohn*, 524 U.S. 236 (1997). This Court held that it had jurisdiction and remanded the case, stating, "in light of the position asserted by the Solicitor General . . . the decision of the Court of Appeals is vacated and remanded for further consideration." *Hohn*, 524 U.S. at 253. This Court therefore has determined that it does have jurisdiction to consider an appeal of the denial of the certificate of appealability. However, it does not logically follow that this Court then has jurisdiction over the underlying claims raised in the original petition for writ of habeas corpus.

It is established that to obtain a certificate of appealability, a petitioner need not show that he would win on the merits of his claims, only that there was a substantial showing of the denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880 (1983). Petitioner must only show that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Clark v. Lewis*, 1 F.3d 814 (9th Cir. 1993). Because Petitioner did not need to establish that he would prevail on the merits to have the certificate of appealability granted, this Court also does not need to consider the merits of the underlying claims to determine that the United States District Court for the Northern District of Illinois and the United States

Court of Appeals for the Seventh Circuit properly denied the request for a certificate of appealability.

CONCLUSION

This case does not present this Court with questions of general importance compelling the exercise of scarce and valuable judicial resources for a merits review. For all of the reasons set forth above, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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